88-804

No. _____

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TONY LYNN DAVIS
Appellant

v.

STATE OF OKLAHOMA
Appellee

ON APPEAL FROM
THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

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THE QUESTIONS PRESENTED BY THE APPEAL

1. The statutes of Oklahoma, as applied to the facts of this case, violate the prohibition against double jeopardy by multiple punishments for the same offense. Said statutes called into question are 21 O.S. §843 (1981) and 21 O.S. §701.8(1) (1981). The trial court erred in not sustaining Appellant's demurrer to the Information; the trial court erred in instructing the jury as to two crimes and sentencing the Appellant for the commission of two crimes.

2. The trial court erred in failing to require the Appellant's presence during a hearing to waive a 12 man jury and obtain in that hearing a personal and informed waiver of a 12 man jury.

PARTIES TO THE PROCEEDING

Tony Lynn Davis, Appellant

Represented by Lawrence A. G. Johnson, Attorney, who entered his appearance herein.

The Attorney General of the State of Oklahoma.

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TONY LYNN DAVIS
Appellant

v.

STATE OF OKLAHOMA
Appellee

ON APPEAL FROM
THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

Pursuant to Rules 12 and 15, the Appellant does hereby submit his *Jurisdictional Statement* as follows:

THE QUESTIONS PRESENTED BY THE APPEAL

1. The statutes of Oklahoma, as applied to the facts of this case, violate the prohibition against double jeopardy by multiple punishments for the same offense. Said statutes called into question are 21 O.S. §843 (1981) and 21 O.S. §701.8(1) (1981). The trial court erred in not sustaining Appellant's demurrer to the Information; the trial court erred in instructing the jury as to two crimes and sentencing the Appellant for the commission of two crimes.

2. The trial court erred in failing to require the Appellant's presence during a hearing to waive a 12 man jury and obtain in that hearing a personal and informed waiver of a 12 man jury.

PARTIES TO THE PROCEEDING

Tony Lynn Davis, Appellant

Represented by Lawrence A. G. Johnson, Attorney, who entered his appearance herein.

The Attorney General of the State of Oklahoma.

REFERENCE TO OFFICIAL REPORTS

59 OBAJ 2197 (August 12, 1988).

STATEMENT OF JURISDICTION

Jurisdiction is based upon an appeal from the Oklahoma Criminal Court of Appeals from a decision dated August 12, 1988 involving a conviction for the crimes of Injury to a Minor Child (Count 1) and Murder in the Second Degree (Count II). The Notice of Appeal was filed on the 26th day of October, 1988 with the Clerk of the Court, Oklahoma Criminal Court of Appeals. The statutory basis of jurisdiction for this appeal is 28 USCS 2101(d) and Rule 11.1 of the **Revised Rules of the Supreme Court of the United States**; 28 USCS §2102, §2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

21 O.S. §843 (1981):

> "Any parent or other person who shall willfully or maliciously injure, torture, maim, or use unreasonable force upon a child under the age of eighteen (18), or who shall cause, procure or permit any of said acts to be done, shall be punished by imprisonment in the state penitentiary not exceeding twenty (20) years, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00), nor more than Five Thousand dollars

($5,000.00), or both such fine and imprisonment."

21 O.S. §701.8(1):

> "Homicide is murder in the second degree in the following cases: 1. When perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual . . . "

21 O.S. §11 (1981):

> "If there be in any other chapter of the laws of this state a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions made in relation thereto, and not by the provisions of this penal code. But an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, except that in cases specified in §§ 51 and 54, the punishments therein prescribed are substituted for those under more than one; and an acquittal or conviction and sentence under either one, bars the prosecution for the same act or omission under any other."

Okla. Const. Art. 2, §21:

> "No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

USCS, Constitution, Amendment 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Okla. Const. Art 2, §19:

> "The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Hundred Dollars ($100), or in criminal cases wherein punishment for the offense charged is by fine only, not exceeding One Hundred Dollars ($100). Provided, however, that the Legislature may provide for jury trial in cases involving lesser amounts. Juries for the trial of civil and criminal cases shall consist of twelve (12) persons; but in the trial of misdemeanors, proceedings for the violation of ordinances or regulations of cities and towns, juvenile proceedings, actions for forcible entry and detainer, or detention only, of real property and collection of rents therefor, and civil cases concerning causes of action involving less than Twenty-five Hundred Dollars ($2,500.00), juries shall consist of six (6) persons. In civil cases, and in criminal cases less than felonies, three-fourths (¾) of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein."

STATEMENT OF THE CASE

Appellant married the mother of the decedent child, the mother working and Appellant staying at home caring for the child. Appellant placed the child upon a sink and left the room for clothing. The child attempted to climb down and fell backwards against the edge of the adjacent tub. He sustained abdominal scrapes and bruises, later developed an upset stomach and was given Pepto-Bismol. Two days later the child, whilst in a bathtub, sustained burns to his feet and fingers of a hand. During the remainder of the week the child was stable and exhibited signs of improvement. At home, the child stopped breathing and was taken to the hospital by the Appellant where he later died after surgery from a transected pancreas. The experts testified only that the injuries did not appear to be consistent with the explanation given by Appellant for his injuries. Appellant was convicted of Injury to a Minor Child and for Second Degree Murder. He was sentenced to twenty years for the Injury to Minor Child and given life imprisonment for the second degree murder charge.

At the preliminary hearing and at the time of trial and prior to instructing the jury, the question of duplicitous charges was raised by demurrer, and each time the demurrers were overruled. At the stage of the jury deliberations, a juror experienced a fit, lost consciousness, fell and struck his head and was dying. The jury foreman ran from the jury room and yelled for the Appellant for help. The judge allowed the Appellant's counsel, the Appellant's mother, and Appellant to enter the jury room and resuscitate the juror. The juror was taken to a hospital. The Appellant's counsel elected to proceed with an eleven man jury. Appellant was not questioned as to his rights in this matter nor was a waiver given by him or consented to by his counsel in open court in his presence. The issue was raised on appeal. The ap-

pellate court affirmed, with the third judge dissenting on the basis of the lack of waiver.

SUSTANTIAL QUESTIONS PRESENTED:

Serious question arises from the duplicitous charges brought based upon the same set of facts which bring to bear the charging of two crimes for the one act, i.e., the charge of Injury to a Minor Child and the charge of Second Degree Murder. We believe that the application of the two statutes by the Oklahoma court places the Appellant liable for multiple punishments for the same offense. The abhorrence to double punishment for the same offense should be addressed by this forum on appeal from the unlawful and unconstitutional application of the state statues.

The right to unanimous verdict is fundamental under the Oklahoma Constitution. As well, the question is presented that a hearing should have been conducted by the trial court for the expression by Appellant of an intelligent waiver of his right to be tried by less than a twelve man jury, there being no meaningful distinction between a complete waiver of a jury and consent to be tried by less than twelve. This waiver is personal to the Appellant and should not have been allowed by an in-chambers hearing out of the presence of the Appellant.

These substantial questions to require plenary consideration with briefs on the merits and oral argument for their resolution.

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Attorney for Appellant

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 12 1988
JAMES W. PATTERSON
CLERK

No. F-86-530

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONY LYNN DAVIS
Petitioner

v.

THE STATE OF OKLAHOMA
Respondent

ORDER DENYING MOTION TO FILE SUPPLEMENTAL BRIEF

The petitioner has filed a request to file a supplemental brief in order to cover those assignments of error not covered in his original brief.

Having carefully examined the petition, and being sufficiently advised in the premises, this Court finds that the petitioner's request should be, and the same is, hereby **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12th day of August, 1988.

S/S Tom Brett
TOM BRETT, PRESIDING JUDGE

S/S Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST:

S/S James Patterson
(Clerk)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 12 1988
JAMES W. PATTERSON
CLERK

FOR PUBLICATION

No. F-86-530

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONY LYNN DAVIS
Appellant

v.

THE STATE OF OKLAHOMA
Appellee

OPINION

BUSSEY, Judge:

The appellant, Tony Lynn Davis, was jointly tried with co-defendant, Donna Ray Harless, for the crimes of Injury to a Minor Child (Count I) and Murder in the Second Degree (Count II) in Case No. CRF-84-3218, in the District Court of Tulsa County. The jury returned a verdict of guilty on both counts against appellant and assessed punishment at twenty (20) years imprisonment and life imprisonment, respectively, and he appeals. We affirm.

The facts of this case are set forth in *Harless v. State,* ____P.2d ____ (Okl.Cr.19____).

For his first assignment of error appellant asserts that the trial court erred in overruling his motion to quash and demurrer. He alleges that the crimes with which he was charged in the information stemmed from a single act. We reject this contention under the facts of this case for the reasons set forth in *De Laune v. State,* 569 P.2d 463, 467 (Okl.Cr.1977), wherein this Court held that, "if the two crimes charged each require the proof of at least one fact which is not required to be proved in the other, the defendant can be charged with more than one crime." Clearly, the elements of the crime of Injury to a Minor Child are dintinguishable from the elements of Second Degree Murder. *See* 21 O.S.Supp.1982, § 843 and 21 O.S.1981, § 701.8(1). In this case, the State presented evidence of Injury to a Minor Child which included, burns, bruises and broken bones; whereas, the evidence establishing the charge of Second Degree Murder was the abdominal trauma and subsequent lack of treatment. Since the crimes charged were separate and distinct and the two convictions were based upon different evidence, this contention is denied.

Appellant next contends that the trial court erred in refusing to strike all the testimony concerning the color photographic slides of the body of Eric Cole Harless since the photographs were taken after emergency care and extensive surgery were performed upon him. For the reasons set forth in *Harless v. State,* ____P.2d ____ (Okl.Cr.19____), we find this contention is without merit.

In his third assignment of error appellant argues that the trial court erred in excusing several jurors for cause merely because they stated they might be financially inconvenienced by jury service.

This Court has consistently held that the manner in which voir dire proceedings are conducted rests within the discretion of the trial court. *Van Woundenberg v. State,* 720 P.2d 328 (Okl.Cr.1986). In the instant case, the trial court explained to the prospective jurors that if serving the next week posed a real serious problem or hardship such that it would be a problem for them to sit in the courtroom and listen, then it was an issue to be resolved. After the explanation, three prospective jurors stated that due to the serious hardship that they would suffer, they did not believe they could devote full attention to the trial. Therefore, the prospective jurors were discharged. We are of the opinion that the trial court properly discharged the prospective jurors under the facts presented. *See Banks v. State,* 701 P.2d 418, 424 (Okl.Cr.1985); 38 O.S.1981, § 28(A). Moreover, appellant has wholly failed to show how the trial court's actions prejudiced him in any way during trial. *Agee v. Gant,* 412 P.2d 155 (Okl.Cr.1966). This contention is without merit.

Appellant's fourth assignment of error is that the trial court erred in not granting him additional or separate peremptory challenges due to the contradictory and adversarial nature of the defense raised by co-defendant.

Title 22 O.S.1981, § 655 provides in pertinent part:

> In all criminal cases the prosecution and the defendant are entitled to the following peremptory challenges: Provided, that if two or more defendants are tried jointly they shall join in their challenges; provided, that when two or more defendants have inconsistent defenses they shall be granted separate challenges for each defendant as hereinafter set forth . . .

This Court has held that for defenses to be inconsistent for purposes of § 655 the defenses of both defendants must be mutually antagonistic, pitting the defendants against one another.

Murray v. State, 528 P.2d 739, 740 (Okl.Cr.1974); *Cooks v. State,* 699 P.2d 653 (Okl.Cr.1985); *Wilhite v. State,* 701 P.2d 774 (Okl.Cr.1985). Each defendant must exculpate himself and inculpate the other. *Murray,* 523 P.2d at 740.

Appellant has failed to demonstrate that the defenses presented by him and co-defendant were antagonistic. Neither party denied that the child was in appellant's care when the injuries were sustained. Appellant's defense was that the child's injuries were sustained through accidents. Co-defendant, on the other hand, claimed that she was not with the child when any of the injuries were sustained; however, she did not directly inculpate appellant during her testimony. Consequently, we uphold the trial court's ruling.

Next, appellant complains that the trial court erred in not granting a mistrial due to a remark by the prosecutor in closing argument which was an intentional and unequivocal request that the jury's verdict should speak on behalf of the victim. Appellant alleges that this single remark determined the verdict of guilt. For the reasons set forth in *Harless v. State,* ____ P.2d____ (Okl.Cr.19____), we reject this contention.

Appellant finally urges that he was denied the right to be present at all proceedings of his trial, and that his entitlement to a twelve-person jury required the discharge of the jury when one of the jurors could no longer continue deliberations due to medical problems. After the jury retired to deliberate, one of the jurors became ill and was not able to continue deliberations, and the trial court subsequently met with trial counsel, without appellant or co-defendant being present. At that meeting, trial counsel waived any motion for mistrial based upon the entry into the jury room by the unauthorized persons when the juror became ill or the loss of one juror. Appellant argues that he was

not consulted regarding this decision prior to trial counsel's agreement to waive the issue.

Absent a showing of incompetence, the appellant is bound by the decisions of his counsel, and mistakes in tactics and trial strategy do not provide grounds for subsequent attack. *United States v. Nolan,* 571 F.2d 523 (10th Cir. 1978). Furthermore, appellant does not have an unconditional constitutional right to be present at all *in camera* discussions where his lawyer is present. *See United States v. Jorgenson* 51 F.2d 516 (19th Cir. 1971), *cert. den.,* 405 U.S. 922, 92 S.Ct. 959, 30 L.Ed.2d 793; *See also Fillmore v. Crisp,* 480 F.Supp. 310 (W.D.Okla.1978).

In the present case, the record clearly reveals that the attorneys for both appellant and co-defendant were in complete agreement to finish the trial with an eleven-person jury which is permitted by 22 O.S.1981, § 895. Also, the jurors assured the trial court that the incident would not affect any further deliberations in the case and that decisions on some of the verdicts had already been reached.

Since trial counsel in his professional judgment waives the right to a twelve person jury, and appellant has wholly failed to show how he was prejudiced by the waiver, we find no error. This assignment is groundless.

The judgment and sentences are **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA
THE HONORABLE JOE JENNINGS, DISTRICT JUDGE

TONY LYNN DAVIS, was jointly tried with co-defendant, Donna Ray Harless, for the crimes of Injury to a Minor Child (Count I) and Murder in the Second Degree (Count II). The jury returned a verdict of guilty on both counts against appellant and

assessed punishment at twenty (20) years imprisonment and life imprisonment, respectively, and he appeals. **AFFIRMED.**

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SUSAN STEWART DICKERSON
ASSISTANT ATTORNEY GENERAL
STATE OF OKLAHOMA
OKLAHOMA CITY, OKLAHOMA
Attorneys for Appellee

OPINION BY: BUSSEY, J.
BRETT, P.J., CONCURS
PARKS, J., DISSENTS

PARKS, Judge, Dissenting:

I must respectfully dissent to the majority's treatment of the appellant's sixth assignment of error. The majority concedes that the appellant was not present at the hearing where the prosecutor and defense counsel agreed to waive a twelve person jury after one of the jurors became ill during deliberations and was unable to continue. Under Article II, section 9 of the Oklahoma Constitution, an accused has a fundamental constitutional right to a unanimous twelve member jury in all felony cases.

This Court has previously held that the trial judge has an affirmative duty to make inquiry of the accused to assure that such waiver was expressly and intelligently made. *See Beck v. State,* 626 P.2d 327, 328 (Okl. Cr. 1981). The instant case is wholly distinguishable from *Hatch v. State,* 662 P.2d 1377, 1381 (Okl. Cr. 1983), where this Court, in finding a valid waiver of the accused's right to trial by jury, noted that the trial judge "painstakingly and carefully examined the appellant personally at length to determine whether the waiver was knowing and intelligent." In the instant case, the trial judge specifically stated that he would be "compelled" to grant a motion for mistrial if requested to do so, and that, "I wouldn't feel uncomfortable in doing that . . . (although) I would hate to have a seven-day trial result in a mistrial, but certainly if either one of the defendants wants to so move, I won't have any hesitancy in granting a mistrial at this point . . . " In spite of this, however, the trial judge failed to make any inquiry of the appellant to determine on the record whether he was personally knowlingly and intelligently waiving his constitutional right to a unanimous twelve person jury.

An examination of prior cases in which this Court has approved waivers of jury trials or juries composed of less than twelve members as mandated by Article II, § 19, of the Oklahoma Constitution for felony cases, reveals that in each case the defendant personally waived such right in open court. *See, e.g., Hatch v. State,* 662 P.2d 1377381 (Okl. Cr. 1983); *Colbert v. State,* 654 P.624 627 (Okl. Cr. 1982); *Holloway v. State,* 365 P.2d 829, 831 (Okl. Cr. 1961); *Trott v. State,* 62 Okl. Cr. 52, 70 P.2d 118, 119 (1937); *Ex parte Hollingsworth,* 46 Okl. Cr. 353, 287 P. 840, 841 (1930). In *Swift v. State,* 510 P.2d 286, 287 (Okl. Cr. 1973), Judge Bussey wrote the opinion reversing a conviction where the defendant had expressly objected to being tried by an eleven member jury. In *Hayes v. State,* 541 P.2d 210, 212 (Okl. Cr. 1975), this Court reversed in a similar situation where the trial court failed to conduct an appropriate inquiry of the defendant to establish a personal waiver, and there was insufficient evidence to show that the defendant authorized, consented to, or ratified the waiver.

The United States Supreme Court has stated that:

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, **in addition to the express and intelligent consent of the defendant**. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

Patton v. United States, 281 U.S. 276, 312, 50 S.Ct. 253, 263, 74 L.Ed. 854 (1930) (emphasis added). The Court in *Patton* specifically found no meaningful distinction between a complete waiver of a jury trial and consent to be tried by less than twelve members. *Id.* at 290, 50 S.Ct. at 255. Federal courts require that the waiver of jury trial be in writing. *See* Fed. R. Crim. Proc. 23(a). The American Bar Association Standards for Criminal Justice, Vol. III, Ch. 15, Trial by Jury, § 1.2(b)(1980) recommends the following:

> The Court shall not accept a waiver unless the defendant, after being advised by the court of his right to a trial by jury, personally waives his right to trial by jury, either in writing or in open court for the record.

Several jurisdictions hold that an accused must personally waive his right to a jury trial either in writing or in open court for the record. *See State v. Swan,* 108 Idaho 963, 703 P.2d 727, 730 (Ct. App. 1985); *Walker v. State,* 578 P.2d 1388 (Alaska 1978); *Rice v. People,* 193 Colo. 270, 565 P.2d 940 (1977); *State v. Butrick,* 113 Ariz. 563, 558 P.2d 908 (1976); *State v. Irving,* 216 Kan. 588, 533 P.2d 1225 (1975); *People v. Holmes,* 54 Cal.2d 442, 5 Cal. Rptr. 871, 353 P.2d 583 (1960).

The record indicates that the trial judge swore in thirteen (13) jurors. I fail to understand why the alternate juror was not utilized. On the basis of the foregoing, I would remand this case to the district court to conduct an evidentiary hearing to determine whether the appellant knowingly and intelligently waived his right to a twelve member jury by consenting, authorizing or ratifying counsel's waiver upon his behalf. In the absence of such a showing at the evidentiary hearing, I believe that the foregoing authority would require that the appellant be given a new trial. In the future, trial courts must carefully examine the defendant in open court to build a record for appellate deter-

minations of an accused's knowing and intelligent waiver of his right to a jury trial. Of course, it would always be preferable, although not mandatory, that such waivers be in writing. According, I respectfully dissent.

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No. F-86-530

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONY LYNN DAVIS
Appellant

v.

THE STATE OF OKLAHOMA
Appellee

NOTICE OF APPEAL

Pursuant to Rule 10.3 of the **Revised Rules of the Supreme Court of the United States**, the Appellant does hereby give notice of appeal to the Supreme Court of the United States.

Party Taking the Appeal: Tony Lynn Davis.

Judgment Appealed From: Opinion Affirming the Conviction and Sentence of Appellant rendered August 12, 1988.

Statutes Under which Appeal is Taken: 28 USCS 2101(d) and Rule 11.1 of the **Revised Rules of the Supreme Court of the United States**; 28 USCS §2102, §2103.

JOHNSON & SWENSON

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(918) 743-0459
Bar #4705
Attorney for Appellant

CERTIFICATE OF SERVICE

Lawrence A. G. Johnson, a member of the Supreme Court Bar, does hereby enter his appearance as attorney for the Appellant, Tony Lynn Davis, and certifies that on the 25 day of October, 1988, pursuant to Rule 28, *Rules-Supreme Court,* I placed a true and correct copy of the foregoing Notice of Appeal in the U.S. Mails, first class, postage prepaid, to the Office of the Attorney General of the State of Oklahoma, Capitol Office Building, Oklahoma City, Oklahoma 73105.

S/S Lawrence A. G. Johnson
Lawrence A. G. Johnson